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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, *et al.*,
and
STATE OF TEXAS,
APPELLANTS,

v.

J. and R. DOE, as Guardian *Ad Litem* for I. Doe, *et al.*,
APPELLEES.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
APPELLANTS,

v.

UNITED STATES OF AMERICA,
INTERVENOR-APPELLEE,
and
CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN,
APPELLEES.

On Appeal From the United States Court of Appeals For the Fifth Circuit

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BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM, *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

	Page
Interest of *Amicus Curiae*	2
Statement of Context	2
Summary of Argument	10
Argument	11
I. Illegal Aliens Are Not Within the Scope of the Equal Protection Clause of the Fourteenth Amendment	11
A. The Decisions of the Lower Courts Are Inconsistent With the Analytical Framework Established by This Court	12
B. The Court's Decisions Extending Other Constitutional Protections to Illegal Aliens Do Not Support the Application of the Equal Protection Clause Here	16
II. Section 21.031 of the Texas Education Code Does Not Violate the Equal Protection Clause	18
A. Illegal Aliens Are Not Members of a Suspect Class	18
B. The Educational Interest at Issue Is Not a Fundamental Interest Warranting Constitutional Protection	20
C. Section 21.031 Is Rationally Related to Legitimate State Purposes	26
1. Section 21.031 Is Rationally Related to the Legitimate State Purpose of Protecting the Fiscal Integrity and Quality of Educational Services Offered by the Texas Public School System.	24
2. Section 21.031 Is Rationally Related to the Legitimate State Purpose of Avoiding Litigation Against the State by Removing a Possible Federal Constitutional Infirmity in a State Statute.	26
Conclusion	29

Table of Authorities

Cases

Page

Ambach v. *Norwick*, 441 U.S. 68 (1979) 11, 12, 14
Blackie's House of Beef, Inc. v. *Castillo*, Nos. 79-1057, *et al.* (D.C. Cir. Jul. 22, 1981) 2, 22
Blake v. *McClung*, 172 U.S. 239 (1898) 17
Boe v. *Wright*, 648 F.2d 432 (5th Cir. 1981) 20, 24, 26, 27, 28, 29
Bolanos v. *Kiley*, 509 F.2d 1023 (2d Cir. 1975) 14
Brown v. *Board of Education*, 347 U.S. 483 (1954) 25
Colorado Anti-Discrimination Comm'n v. *Continental Air Lines*, 372 U.S. 714 (1963) 28
County of Los Angeles v. *United States*, No. CV 79-2316 (C.D. Cal., filed Jun. 20, 1979) 7
Dandridge v. *Williams*, 397 U.S. 471 (1970) 24
De Canas v. *Bica*, 424 U.S. 351 (1976) 6, 13, 15, 18
Doe v. *Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd* 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 49 U.S.L.W. 3819 (May 4, 1981) ..... passim
Examining Board of Engineers, Architects and Surveyors v. *Flores de Otero*, 426 U.S. 572 (1976) 11, 15, 18, 27
Foley v. *Connelie*, 435 U.S. 291 (1978) ... 11, 12, 14, 16, 19
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 19
Galvan v. *Press*, 347 U.S. 522 (1954) 23
Gastelum-Quinones v. *Kennedy*, 374 U.S. 469 (1963) 23
Graham v. *Richardson*, 403 U.S. 365 (1971) 11, 14, 18, 19, 24, 27
Graham v. *Smith*, No. 81-1479 (S.D. Fla., filed Jul. 17, 1981) 8
Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 17
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 23
Hernandez v. *Texas*, 347 U.S. 475 (1954) 19
Hill v. *Florida*, 325 U.S. 538 (1945) 28
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 28
Holley v. *Lavine*, 429 F.2d 1294 (2d Cir. 1976) 14

Page

In re Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd mem.* (5th Cir. Feb. 23, 1981), *prob. juris. noted*, 49 U.S.L.W. 3924 (June 15, 1981) ..... passim
In re Griffiths, 413 U.S. 717 (1973) 11, 14, 15
Johnson v. *Eisentrager*, 339 U.S. 763 (1959) 12, 13
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 28
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 13, 15
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 18
Loving v. *Virginia*, 388 U.S. 1 (1967) 19
Martinez v. *Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936) 14
Mathews v. *Diaz*, 426 U.S. 67 (1976) 12, 13, 17
McGowan v. *Maryland*, 366 U.S. 420 (1961) 24
Nyquist v. *Nauclet*, 432 U.S. 1 (1977) 11, 19
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 20
Shapiro v. *Thompson*, 394 U.S. 206 (1953) 24, 27
Shaughnessy v. *United States ex rel Mezei*, 345 U.S. 206 (1953) 15
Sugarman v. *Dougall*, 413 U.S. 634 (1973) 11, 12, 15
Truax v. *Raich*, 239 U.S. 33 (1915) 14, 16
United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 24
United States v. *State of Texas*, 506 F. Supp. 405 (E.D. Tex. 1981) 25
Williams v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971) .. 14
Wisconsin v. *Yoder*, 406 U.S. 206 (1972) 25
Wong Wing v. *United States*, 163 U.S. 228 (1896) 11

Constitutions

U.S. CONST. amend. XIV, §1 ..... passim
CONSTITUTION OF MEXICO tit. I, ch. I, arts. 3(VI)-(VII) .. 21

Page

Statutes

8 U.S.C. §1227(1976) 19
§1251(a)(6) (1976 & Supp. III 1979) 23
§1255(c)(2) (1976 & Supp. III 1979) 23
CAL. LAB. CODE §2805 (West 1980 Supp.) 7
CAL. UNEMP. INS. CODE §1264 (West 1980 Supp.) 8
CONN. GEN. STAT. §31-51K (1981) 7
DEL. CODE ANN. §19-705 (1979) 7
FLA. STAT. ANN. §448-09 (West 1981) 7
KAN. STAT. ANN. §21-4409 (1980 Supp.) 7
MASS. GEN. LAWS ANN. ch. 149, §19C (1980 Supp.) 7
ME. REV. STAT. ANN. ch, 26, §871 (West 1980) 7
N.Y. SOC. SERV. L. §131-k (McKinney 1980) 8
TEX. EDUC. CODE ANN. tit. 2, §21.031 (Vernon 1980) ..... passim
VA. CODE §40.1-11.1 (Michie 1981) 7

Miscellaneous

Crewdson, *Illegal Aliens Are Bypassing Farms For Higher Pay in Cities*, N.Y. Times, Nov. 10, 1980 7
D. NORTH, ENFORCING THE IMMIGRATION LAW: A REVIEW OF OPTIONS (Washington, D.C. Sept. 1980) 7
D. NORTH, GOVERNMENT RECORDS: WHAT THEY TELL US ABOUT THE ROLE OF ILLEGAL IMMIGRANTS IN THE LABOR MARKET AND IN INCOME TRANSFER PROGRAMS (Washington, D.C. April 1981) 7
HOUSE SELECT COMM. ON POPULATION, 95th CONG., 2d SESS., LEGAL AND ILLEGAL IMMIGRATION TO THE UNITED STATES (Comm. Print 1978) 4
H. WOOD and B. PHILLIPS, THE LABOR SUPPLY FOR LOW-LEVEL OCCUPATIONS (Washington, D.C. June 1975) 6
INTERAGENCY TASKFORCE ON IMMIGRATION POLICY, STAFF REPORT (March 1979) 3, 4, 5, 6, 8

Page

Miscellaneous (cont.)

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M. Piore, Birds of Passage (1979) 27
National Commission for Manpower Policy, Manpower and Immigration Policies in the United States 191 (Feb. 1978) 3, 6
Office of the White House Press Secretary, Statement by the President (July 30, 1981) 8
Population Reference Bureau, Inc., 1981 World Population Data Sheet 5
Sehgal and Vialet, *Documenting the Undocumented: Data, Like Aliens, Are Elusive*, 103 Monthly Labor Review (October 1980) 4
Select Commission on Immigration and Refugee Policy, U.S. Immigration and the National Interest (March 1981) 2, 3, 6, 7
Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 Foreign Affairs (1980) 3, 5
United States Domestic Council Committee on Illegal Aliens, Preliminary Report (1976) 8
U.S. Dep't of Justice, Testimony of William French Smith, Attorney General, Before the Senate Subcomm. on Immigration and Refugee Policy and the House Subcomm. on Immigration, Refugees and International Law (July 30, 1981) 3, 8

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BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM, *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

Interest of Amicus Curiae

The Federation for American Immigration Reform (FAIR) is a nonprofit membership corporation founded in 1978 for the purposes of educating the general public concerning the economic, social, environmental, demographic and other effects of immigration into the United States. FAIR seeks, *inter alia*, to enhance the ability of the United States to control illegal immigration into this country. The outcome of the present cases could have a significant adverse impact on the ability of the federal government to control the flow of illegal aliens[1] into this country. Accordingly, FAIR seeks this opportunity to express to the Court its views on the issues presented by these cases.

Statement of Context

These cases come before the Court at a time when immigration to the United States is at or near the highest level in our history and increasing rapidly. A substantial portion of this flow is made up of illegal aliens, people who have circumvented American immigration laws to enter or remain in this country. The phenomenon of illegal immigration has grown to such proportions in recent years that many Americans fear our immigration policy is "out of control".[2]

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[1] Various terms have been used to describe persons present in the United States in violation of federal immigration laws, including illegal aliens, undocumented workers and illegal immigrants. We adopt here the convention recently employed by the U.S. Court of Appeals: "The term 'illegal alien' refers to a foreign national who enters or remains in the United States in violation of 8 U.S.C. §§1101-1503 (Supp. III 1979)." *Blackie's House of Beef, Inc.* v. *Castillo*, Nos. 79-1057, *et al.*, *slip op.* at 3 n.2 (D.C. Cir. Jul. 22, 1981).

[2] SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION AND THE NATIONAL INTEREST 10 (March 1981) (introductory remarks by FATHER THEODORE M. HESBURGH, Chairman of the Commission) [hereinafter cited as U.S. IMMIGRATION POLICY].

Attorney General William French Smith recently testified before Congress that "our policies intended to effect the necessary control of our borders have failed.... We have lost control of our borders."[3]

FAIR offers this Statement of Context because of its belief that pressures for further migration from other countries are growing and that the decision in these cases could well encourage illegal immigration into this country at the very time current executive, legislative, and other efforts are being vigorously pursued to secure precisely the opposite objective. To explain this concern requires a brief discussion of recent data respecting immigration.

In 1980, over 800,000 legal immigrants and refugees were admitted to the United States by federal immigration authorities.[4] Legal immigration to the United States is by far the highest of any country in the world.[5] One commentator has estimated that in one recent year legal immigration to the United States was over twice that to all other countries of the world combined.[6]

The United States has recently experienced a large inflow of illegal entrants such as appellees. Because of the surreptitious or fraudulent nature of their entry into and residence in this country, reliable data on the total number of illegal aliens present in the country at any given time is not available. Estimates of the total illegal alien population of the United

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[3] U.S. DEP'T OF JUSTICE, TESTIMONY OF WILLIAM FRENCH SMITH, ATTORNEY GENERAL, BEFORE THE SENATE SUBCOMM. ON IMMIGRATION AND REFUGEE POLICY and the HOUSE SUBCOMM. ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW (July 30, 1981).

[4] U.S. IMMIGRATION POLICY, *supra* note 2, at 93 (using Immigration and Naturalization Service data).

[5] INTERAGENCY TASKFORCE ON IMMIGRATION POLICY, STAFF REPORT 1 (March 1979) [hereinafter cited as STAFF REPORT]; NATIONAL COMMISSION FOR MANPOWER POLICY, MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES 191 (Feb. 1978) [hereinafter cited as MANPOWER POLICIES].

[6] Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFFAIRS 21, 24 (1980) [hereinafter cited as Teitelbaum].

States made by federal immigration officials at various times between 1974 and 1978 varied from a high of eight million to a low of three million.[7] Most experts in the area would regard an estimate of three to six million for years in the mid-1970's to be reasonable.[8]

Evidence indicates that the annual flow of illegal aliens into this country has increased substantially in recent years. The number of apprehensions of illegal entrants by the Immigration and Naturalization Service ("INS") increased over 2000 percent in the twelve years from 1965 to 1977, rising from under 49,000 to over 1,000,000.[9] Figures on apprehensions in fact indicate more about the number of attempts to enter this country than the number of people making such attempts. Estimates as to the precise number of those who remain here each year are more uncertain. Recent studies generally agree that there has been a significant positive net flow in recent years,[10] which also means that the resident population of illegal aliens is increasing.

More important than the exact number of illegal aliens who reside here, however, is the intensification of the factors giving rise to the demand to migrate in major sending countries. The so-called "push factors" fueling increased immigration, including high fertility rates, relatively youthful populations and the inability of national economies to accomodate the large population increases, are projected to continue to increase in the coming decades.[11] The Population Reference Bureau has

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[7] Staff Report, *supra* note 5, at 383. These include, in chronological order, estimates of 6-7 million (Sept. 1974), 5 million (April 1975), 8 million (Sept. 1975), 6 million (Nov. 1976), 4 million (1977) and 3-6 million (1978). *Id.*

[8] House Select Comm. on Population, 95th Cong., 2d Sess., Legal and Illegal Immigration to the United States 16 (Comm. Print 1978) [hereinafter cited as House Report]; Teitelbaum, *supra* note 6, at 25.

[9] Staff Report, *supra* note 5, at 378.

[10] *See* Sehgal and Vialet, *Documenting the Undocumented: Data, Like Aliens, are Elusive*, 103 Monthly Labor Review 19 (October 1980)(summarizing a number of recent studies).

[11] House Report, *supra* note 8, at 24-29; Staff Report, *supra* note 5, at 17.

estimated that between mid-1981 and the year 2000, population in the less developed countries will increase by nearly a billion and one-half, compared to a projected increase of only 111 million for the more developed countries and 29 million for the United States.[12] The current combined fertility rate for the less developed countries is estimated at 4.3, compared with 2.0 for the developed countriesand 1.8 for the United States.[13] This high growth rate is mirrored in the five major source countries of immigrants to the United States.[14]

This explosive growth in the numbers of people seeking jobs, housing, and social services represents an enormous challenge to the leaders of the less developed countries. Mexico, which is among the most economically advanced of the major source countries of immigrants to the United States, is a good case in point. One commentator has estimated that in order to accomodate projected population increases over the next two decades without increasing already high rates of unemployment, the Mexican economy must generate 700,000 new jobs per year during that period.[15] Optimistic official projections of the Mexican government forecast the creation of only 350,000 new jobs per year.[16]

As these push factors intensify, so does the pressure to emigrate. But, with visa quotas for most major sending countries already oversubscribed for years into the future,[17] it can

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[12] Population Reference Bureau, Inc., 1981 World Population Data Sheet. This estimate assumes total immigration to the United States, legal and illegal, of 500,000 persons per year.

[13] *Id.*

[14] Mexico, the Philippines, South Korea, Cuba and India were the five top sending countries in 1976. House Report, *supra* note 8, at 19. *See* Population Reference Bureau, Inc., 1981 World Population Data Sheet.

[15] Teitelbaum, *supra* note 6, at 29.

[16] *Id.*

[17] *See* Staff Report, *supra* note 5, at 87-90.

be expected that this growing pressure will manifest itself in increased levels of illegal immigration into this country. The apparent growth of illegal immigration in recent years and the likelihood of its future growth have created widespread concern regarding its impact on the United States economy and society.

The effects of illegal immigration on the United States economy have received considerable attention.[18] One recent study found that the presence of illegal aliens in the labor market introduces major inequities into that market, depressing wages and preventing the improvement of working conditions for Americans in low-paying, low-status jobs.[19] This finding is significant, as disproportionate numbers of disadvantaged Americans—minorities, the handicapped, women heads of families — are in this sector of the labor market.[20] The study also concludes that continued illegal immigration could lead, for the first time in American history, to a two-class labor force and a two-class society.[21]

In addition to adversely affecting wages and working conditions, illegal aliens directly displace some citizens and legal resident aliens from jobs.[22] Moreover, while many, perhaps most,

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[18] There have been numerous studies of the effect of illegal aliens on U.S. labor markets and economies. MANPOWER POLICIES, *supra* note 5; U.S. IMMIGRATION POLICY, *supra* note 2, sec. 2; STAFF REPORT, *supra* note 5, ch. XI.

[19] MANPOWER POLICIES, *supra* note 5, at 158.

[20] This sector, referred to by some economists as the "secondary" labor market, is characterized by low wages, unattractive working conditions and minimal opportunities for advancement. It is generally concentrated in agriculture, services and light industry where levels of unionization are low. *See generally* H. WOOD and B. PHILLIPS, THE LABOR SUPPLY FOR LOW-LEVEL OCCUPATIONS (Washington, D.C. June 1975).

[21] MANPOWER POLICIES, *supra* note 5, at 159-61.

[22] *Id.* at 163. It might be noted that the Court itself agreed with most of these findings in its opinion in *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976), stating:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

illegal aliens are found in rural, low-skilled jobs, a substantial number are finding their way into better paying employment in the cities.[23] These problems have contributed to the enactment of statutes restricting employment of illegal aliens in at least eight states.[24]

Another effect of the presence of large numbers of illegal aliens is an increased demand for government services. Until recently, it has been assumed that illegal aliens use some services, particularly public education and medical benefits, but make less use of cash assistance programs.[25] Recent empirical studies have begun to cast doubt on this latter assumption.[26]

The resulting drain on state and local resources is most acute in border areas such as Texas and California. State or local governments in these and other areas have attempted to minimize through various devices the added burden illegal aliens impose on their provision of services. For example, the County of Los Angeles has sued the federal government for over $200 million for reimbursement of medical expenses incurred by illegal aliens in county facilities.[27] The State of Florida has recently sued the federal

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[23] Crewdson, *Illegal Aliens Are Bypassing Farms For Higher Pay in Cities*, N.Y. Times, Nov. 10, 1980, at 1, col. 4-5 (one of a series of articles for which author was awarded the Pulitzer Prize). In 1980, the average wage of illegal aliens apprehended in Los Angeles County over a three-month period was reported to be $5.25 per hour. *Id.* at D9, col.1-5. In Chicago, the annual average income of apprehended illegal aliens over the same period was $9,360, nearly twice the federal government's poverty level. *Id.*

[24] California, CAL. LAB. CODE §2805 (West 1980 Supp.); Connecticut, CONN. GEN. STAT. §31-51K(1977); Delaware, DEL. CODE ANN. §19-705 (1979); Florida, FLA. STAT. ANN. §448.09 (West 1981); Kansas, KAN.STAT.ANN. §21-4409 (1980 Supp.); Maine, ME.REV.STAT.ANN. ch. 26, §871 (West 1980); Massachusetts, MASS.GEN.LAWS.ANN. ch. 149, §19C; and Virginia, VA. CODE §40.1-11.1 (Michie 1981).

[25] *See* IMMIGRATION POLICY, *supra* note 2, at 38; HOUSE REPORT, *supra* note 8, at at 32-38.

[26] *See* D. NORTH, GOVERNMENT RECORDS: WHAT THEY TELL US ABOUT THE ROLE OF ILLEGAL IMMIGRANTS IN THE LABOR MARKET AND IN INCOME TRANSFER PROGRAMS vii-viii (Washington, D.C. April 1981); D. NORTH, ENFORCING THE IMMIGRATION LAW: A REVIEW OF OPTIONS 73-75 (Washington, D.C. Sept. 1980). North reports that one study estimates that over $50,000,000 was saved in calendar year 1979 as a result of a program instituted in Los Angeles County which required applicants for certain federal welfare benefits to complete INS questionnaires. *Id.*

[27] *County of Los Angeles* v. *United States*, No. CV 79-2316 (C.D. Cal., filed June 20, 1979).

government for its allegedly unlawful accomodation of illegal Haitian aliens in South Florida.[28] The laws of both New York[29] and California[30] deny welfare benefits to illegal aliens.

There are other long-range effects of illegal immigration on the future of this country, beyond those on the labor market or government services. For example, Americans might have slowed U.S. population growth by having smaller families. Yet immigration, both legal and illegal, may have doubled the rate of growth of the U.S. population in recent years.[31] It is FAIR's view that our energy, water and land resources are surely not unlimited and that controlling illegal immigration is consequently an important national imperative.

Our understanding of the available policy alternatives has fortunately been significantly advanced in the past five years through a series of studies of the issues. The Domestic Policy Council prepared a report for President Ford in late 1976.[32] President Carter established an Interagency Task Force to make a detailed analysis of the problem in 1977.[33] This series of government studies culminated in establishment of the Select Commission on Immigration and Refugee Policy. A bipartisan panel composed of representatives from Congress, the Executive and the general public, the Commission recently delivered to Congress a report containing recommendations for comprehensive reform of U.S. immigration and refugee policy.[34] In addition, President Reagan has submitted his own set of recommendations to the Congress.[35]

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[28] *Graham* v. *Smith*, No. 81-1479 (S.D. Fla., filed July 17, 1981).

[29] N.Y. Soc. Serv. L. §131-k (McKinney 1980).

[30] Cal. Unemp. Ins. Code §1264 (West 1980 Supp.).

[31] L. Bouvier, The Impact of Immigration on U.S. Population Size i (Jan. 1981).

[32] United States Domestic Council Committee On Illegal Aliens, Preliminary Report (1976).

[33] Staff Report, *supra* note 5.

[34] U.S. Immigration Policy, *supra* note 2.

[35] Office of the White House Press Secretary, Statement by the President (July 30, 1981); U.S. Dep't of Justice, Testimony of William French Smith, Attorney General, Before the Senate Subcomm. on Immigration and Refugee Policy and the House Subcomm. on Immigration, Refugees and International Law (July 30, 1981).

These cases thus come to the Court as the President and the Congress are on the brink of devising new federal policies to deal with illegal immigration. A decision that illegal aliens who establish residence in this country are constitutionally entitled to an education at public expense could handicap these efforts for two reasons.

First, it could increase illegal immigration directly. Migration results from the complex interaction of "push" and "pull" factors. If overpopulation and underdevelopment are the "push", job opportunities, high wages, and available government benefits are the "pull'. A guarantee of a free education in the United States for their children would not only be added incentive to millions of parents throughout the world but would also encourage illegal aliens who might otherwise return home after a temporary period of employment to bring their families and settle.

Second, such a decision could, at the very least, open to legal challenge state and local government efforts to prevent illegal aliens from utilizing various government programs other than education. A likely consequence of such challenges would be invalidation of such efforts on the strength of the Court's postulated decision and a resultant increase in the utilization of state and locally provided benefits by illegal aliens already here, at the very time governments at those levels are cutting back in response to taxpayer initiatives and shrinking federal assistance.

The decisions of the lower courts, if sustained, would validate for the first time the claim of illegal aliens to important public services. It would increase the pull factors which draw illegal aliens to this country and almost surely increase the incidence of their use of government services even if their numbers do not grow. At stake in this case is the power of the United States to control immigration and therefore its borders, and, in a larger sense, its future. A decision which would at once dilute this power and encourage lawless behavior is at odds with the fundamental character of our government.

Summary of Argument

The Court has been consistently meticulous in the past to extend the reach of the Equal Protection Clause only to lawfully resident aliens and not to illegal aliens. This is so because the Court has viewed the rights enjoyed by aliens to be dependent upon the strength of their ties to the United States and bare physical presence in this country as an insufficient basis on which to lay claim to equal treatment with those whose relationship with this country is substantially stronger. The extension of other constitutional guarantees to illegal aliens, particularly that of due process of law, is not persuasive authority to the contrary both because the Court has indicated that constitutional guarantees should be extended to illegal aliens an a case-by-case basis and because other rights extended to illegal aliens are not concerned with equality of treatment.

In any event, the Texas statute at issue does not deny equal protection of the laws to appellees' children. Their status as illegal aliens, however brought about, is capable of immediate voluntary or involuntary cessation and, because of its illegal nature, is not a proper subject for special judicial solicitude, thus removing them from categorization as a suspect class. Appellees' children have not been totally deprived of an education by the state's legislation, nor, because of their illegal status, would the free education they seek serve its purpose to make effective the exercise of rights to vote, to expression and to employment, and thus its availability to them is not a fundamental interest warranting strict scrutiny.

The Texas statute effectively serves important state purposes, especially given Texas' location as a border state. The state legislature could properly have chosen to protect the fiscal health, and therefore the quality, of its education system by withdrawing the right to a free public education from illegal aliens, particularly in light of the fact that the burden of their presence falls primarily on those schools which are least able to afford it. Moreover, because a failure to do so would be inconsistent with the federal decision to exclude such persons from this country and would also thereby expose the state to the risk of onerous litigation over

whether the unaltered state educational scheme was preempted under the Supremacy Clause, it could properly choose to protect its treasury from a diversion of resources necessary to defend its laws in court, by removing the statutory provision creating such vulnerability.

Argument

I. Illegal Aliens Are Not Within the Scope of the Equal Protection Clause of the Fourteenth Amendment.

Section one of the Fourteenth Amendment to the United States Constitution prohibits a state from denying the equal protection of the laws to any person within its jurisdiction.[36] As noted by the Fifth Circuit in its opinion in *Doe* v. *Plyler*, 628 F.2d 448, 455 (5th Cir. 1980), this Court "has never explicitly addressed whether the equal protection clause extends to illegal aliens". The Court's prior decisions holding aliens to be within the scope of the Equal Protection Clause have all involved aliens lawfully within the United States. *Ambach* v. *Norwick*, 441 U.S. 68 (1979); *Foley* v. *Connelie*, 435 U.S. 291, 292 (1978); *Nyquist* v. *Mauclet*, 432 U.S. 1, 4-5 (1977); *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717, 718 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634, 636 (1973); *Graham* v. *Richardson*, 403 U.S. 365, 367-70 (1971). The issue of whether or to what extent the Equal Protection Clause applies to illegal aliens is thus squarely presented in the cases here under review.

The Fifth Circuit held in *Plyler* that appellees' children, illegal aliens, were within the purview of the Equal Protection Clause. Relying primarily on what it called the "simple language of the Fourteenth Amendment" and *dicta* from this Court's decision in *Wong Wing* v. *United States*, 163 U.S. 228 (1896), the Court reasoned that all persons physically present within territorial

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[36] Section one states in pertinent part that:

> No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

boundaries of the United States, regardless of the legality of that presence, were persons within the jurisdiction of their state of residence. *Plyler*, 628 F.2d at 454-56. The district court held likewise in its opinion in *In re Alien Children Education Litigation*, 501 F. Supp. 544, 570 (S.D. Tex. 1980), *aff'd mem.* (5th Cir. Feb. 23, 1981) (unpublished order).

FAIR contends that the conclusions of the lower courts on this issue are inconsistent with the prior decisions of this Court dealing with the degree of constitutional protection afforded to aliens in general and to illegal aliens in particular and are not mandated by the logic of the Court's cases extending the Due Process Clauses of the Fifth, and especially the Fourteenth, Amendments to illegal aliens.

A. *The Decisions of the Lower Courts Are Inconsistent With the Analytical Framework Established by This Court.*

The prior decisions of the Court dealing with the degree of constitutional protection to be afforded aliens have established an analytical framework in which an alien becomes entitled to an "ascending scale of rights" as his ties with this country increase and strengthen. *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950). This approach, grounded on the proposition that the Constitution clearly indicates that "the status of citizenship was meant to have significance in the structure of our government",[37] includes the corollary proposition that those among various classes of aliens nearest to the status of citizenship have a greater claim to the privileges and protections of citizens than those whose position is further from that status.[38] The Court has thus held that citizens, lawfully resident aliens, illegal aliens and nonresident aliens all stand on different constitutional footings, enjoying in that sequence a declining level of protection from the Constitution. *Compare Foley* v. *Connelie*, 435 U.S. 291 (1978) (lawfully resi-

[37] *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979). *See also Sugarman* v. *Dougall*, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting).

[38] *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976) (upholding statutory distinction between "citizens and those who are most like citizens" on the one hand and "those who are less like citizens" on the other).

dent aliens may be barred only from certain limited types of employment reserved for citizens) *with De Canas* v. *Bica*, 424 U.S. 351 (1976) (illegal aliens have no federal right to employment of any sort); and *compare Mathews* v. *Diaz*, 426 U.S. 67 (1976) (illegal aliens are entitled to due process of law) *with Kleindienst* v. *Mandel*, 408 U.S. 753 (1972) (nonresident aliens have no right to due process of law).

The framework developed by the Court for the determination of the protections guaranteed aliens by the Constitution was perhaps best expressed in the Court's opinion in *Mathews* v. *Diaz*, 426 U.S. 67 (1976):

> [T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between an alien and this country: Congress may decide that as the alien's ties grow stronger, so does the strength of his claim to an equal share of that munificence.

Id. at 80 (emphasis in original).

Similarly, in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Court stated that an alien obtains a gradually increasing scale of constitutional rights as his ties with this country increase.

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

339 U.S. at 770.

The Court has consistently applied this "ascending scale of rights" doctrine. In two recent cases, for example, the Court distinguished between the protections afforded under the Equal Protection Clause to citizens and lawfully resident aliens. *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (holding state could restrict certification of public school teachers to citizens and lawfully resident aliens who had expressed the intention to become citizens); *Foley* v. *Connelie*, 435 U.S. 291 (1978) (holding state could restrict employment as state police officer to citizens).

Moving down the scale, the Court has likewise clearly distinguished between lawfully resident aliens and illegal aliens. As noted above, the prior decisions of this Court explicitly dealing with the application of the Equal Protection Clause to aliens have all dealt with aliens lawfully present within the United States. In each of these decisions, the Court has carefully and consistently pointed this fact out. For example, the Court concluded in *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971), that the term "person" as used in the Equal Protection Clause "encompasses lawfully admitted aliens as well as citizens". Likewise, in *In re Griffiths*, 413 U.S. 717, 719-20 (1973), the Court stated that "a lawfully admitted resident alien is a 'person' within the meaning of the Fourteenth Amendment's directive that a State must not 'deny to any person within its jurisdiction the equal protection of the laws'." *Cf. Foley* v. *Connelie*, 435 U.S. 291, 294 (1978); *Truax* v. *Raich*, 239 U.S. 33, 39 (1915).[39] By its choice of language in these cases, the Court has by

[39] While there have been suggestions in *dicta* in several lower federal court opinions (other than those in the present cases) that illegal aliens are within the scope of the Equal Protection Clause, the decisions in those cases do not appear to rest on equal protection grounds. *See Holley* v. *Lavine*, 429 F.2d 1294 (2d Cir. 1976) (reversing district court holding that an illegal alien's claim of entitlement to equal protection of the laws failed to state a claim upon which relief could be granted); *Bolanos* v. *Kiley*, 509 F.2d 1023 (2d Cir. 1975) (holding that a deportable alien does not possess a constitutional right to remain in the United States for whatever period the resolution of claims by him against state officers may require); *Williams* v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971) (holding "bonded aliens" resident in jurisdiction have constitutional right of access to divorce courts; no determination of legality of residence); *Martinez* v. *Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936) (holding illegal aliens are entitled to access to court system).

negative implication steadily indicated that illegal aliens are not on a constitutional par with lawfully admitted aliens, at least insofar as the Equal Protection Clause is concerned.

The Court's decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976), similarly differentiates between the protections enjoyed by illegal aliens and lawfully resident aliens. The California statute challenged in that case prohibited an employer from knowingly employing an alien not lawfully resident in the United States if such employment would have an adverse effect on lawfully resident workers. The Court held the statute was not constitutionally invalid either as an intrusion into the exclusive federal power over immigration or as preempted by Congressional action. *Id.* at 356. The Court stated in its opinion that the illegal aliens dealt with by the California statute had "no federal right to employment" within the United States. *Id.* at 355. It is, on the other hand, well-established that lawfully resident aliens do have a constitutionally protected right to seek and maintain employment in this country, although not on a complete par with citizens. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976) (state may not constitutionally bar alien from employment as engineer); *In re Griffiths*, 413 U.S. 717 (1973) (practice of law); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (employment in state's classified civil service).

Finally, at the bottom of the scale are nonresident aliens seeking to enter this country who, for example, have no constitutional right of entry nor a constitutional entitlement to any process beyond what Congress chooses to provide. *See, e.g., Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Shaughnessy* v. *United States ex rel Mezei*, 345 U.S. 206 (1953).

In the context of this analytical framework, the Court's opinion in *De Canas* v. *Bica*, 424 U.S. 351 (1976), holding that illegal aliens have no federally protected right to employment in the United States, calls into serious question the applicability of the Equal Protection Clause to illegal aliens. The Court has stated previously that the right to seek and maintain employment on an equal basis is one of the most important rights protected from state deprivation by the

Equal Protection Clause. In *Truax* v. *Raich*, 239 U.S. 33 (1915), the Court, in holding that Arizona could not prohibit lawfully resident aliens from employment within the state, stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of equal protection of the laws would be a barren form of words.

239 U.S. at 41.

The Court has likewise characterized the state statutes barring aliens from employment, invalidated in *Sugarman*, *In re Griffiths* and *Flores de Otero*, as striking "at the noncitizens' ability to exist in the community", *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978), an ability which was protected by the Equal Protection Clause. Contrasted with those cases, the Court's decision in *De Canas* upholding the bar to employment of illegal aliens, when considered alongside the care with which the Court has extended the reach of the Equal Protection Clause exclusively to lawfully resident aliens, implicitly forecloses to illegal aliens a legitimate claim to the protection of that Clause.

B. *The Court's Decisions Extending Other Constitutional Protections to Illegal Aliens Do Not Support the Application of the Equal Protection Clause Here.*

In reaching their conclusions that the Equal Protection Clause applies to illegal aliens, the lower courts relied heavily on this Court's cases holding illegal aliens entitled to due process of law. *Plyler*, 628 F.2d at 454-56; *Alien Children*, 501 F. Supp. at 567-70. As discussed in the previous section, the Court's approach to the determination of the constitutional protections afforded to aliens in general is based on the nature of the alien's relationship with this country and the constitutional right implicated. Thus, a deter-

mination by the Court that illegal aliens are entitled to the protection of one particular constitutional provision (*e.g.*, due process of law) does not automatically yield the result that they are entitled to any other particular constitutional provision (*e.g.*, equal protection). The Court's decisions indicate, rather, that the application of constitutional protections to aliens should be examined on a case-by-case basis.

The Court has expressly stated that its decisions holding that aliens are entitled to due process of law do not mean that aliens are entitled to all other protections and privileges afforded to citizens. Thus in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), the Court observed:

> [t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.

Id. at 78. Likewise, in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976), the Court held that the protections provided by the constitutional guarantees of due process and equal protection "are not always coextensive" in the context of statutes drawing classifications based on alienage.

This recognized distinction among the embrace of different constitutional provisions, when combined with constitutional language restricting the Equal Protection Clause but not similarly encumbering the Due Process Clause,[40] leaves the Court free to maintain its established limitation on the application of the former Clause exclusively to lawfully resident aliens while not so limiting the latter Clause.

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[40] The Fourteenth Amendment proscribes the denial by a state of due process of law to "any person", while a state is prohibited from denying the equal protection of the laws to "any person within its jurisdiction". Although there does not appear to be any precedent which discusses how the phrase "within its jurisdiction" might relate to legality of presence, the Court has held that the phrase creates a positive limitation on the scope of equal protection. *Blake* v. *McClung*, 172 U.S. 239, 260-61 (1898). *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 & n. 17 (1976) (noting the difference in language in the two Clauses). Because appellees' presence in the United States violates federal law, declaring them not to be "within [the]

II. Section 21.031 of the Texas Education Code Does Not Violate the Equal Protection Clause.

The Court need not, however, reach in these cases the issue of whether and to what extent illegal aliens are protected by the Equal Protection Clause, since even if the Equal Protection Clause were held to apply, it would not be violated by section 21.031. Strict judicial scrutiny is not the appropriate standard of review of section 21.031 because illegal aliens are not and should not be held to be members of a suspect class and the education interest at issue here is not a fundamental one warranting protection by the Constitution. Under the rational basis standard, section 21.031 passes constitutional muster in that it bears a rational relation to at least two legitimate state purposes, protection of the financial integrity of the public school system and removal of a state-provided incentive to illegal immigration which exposes the state to litigation of the sort represented by *De Canas* v. *Bica*, 424 U.S. 351 (1976).

A. *Illegal Aliens Are Not Members of a Suspect Class.*

The Court's prior decisions applying strict judicial scrutiny to classifications distinguishing aliens from citizens rest principally on two lines of reasoning. First, lawfully resident aliens have been held to possess the traditional indicia of suspectness and thus to be a "prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). The second, grounded in the Supremacy Clause and the naturalization power, recognizes that the Constitution vests exclusive responsibility for regulation of immigration and naturalization in Congress and that state action disadvantaging aliens impermissibly interferes with the exercise of this power embodied in their lawful admission to this country. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de*

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jurisdiction" of the State of Texas within the intendment of the Fourteenth Amendment would give substance to language which cannot be read as superfluous. *Cf. Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (holding that an alien paroled into the United States pending the outcome of deportation proceedings was not "within the United States" within the meaning of section 243(h) of the Immigration and Nationality Act).

Otero, 426 U.S. 572, 602 (1976); *Graham*, 403 U.S. at 372, 377. Neither of the decisional bases of *Graham* and its progeny applies to illegal aliens.

One of the indicia of a suspect class which the court has identified is that the class is defined by "an immutable characteristic determined solely by accident of birth". *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). Such a characteristic is present with respect to each of the three classes which have been held by the Court to be suspect: race, *Loving* v. *Virginia*, 388 U.S. 1 (1967); national ancestry, *Hernandez* v. *Texas*, 347 U.S. 475 (1954); and legal alienage, *Graham* v. *Richardson*, 403 U.S. 365 (1971). While the status of alienage is not immutable in the same sense as race or national ancestry in that aliens can generally apply for citizenship, it is a characteristic beyond the control of the alien for at least a certain period of time because of durational residency requirements imposed by Congress for the attainment of citizenship. *Foley* v. *Connelie*, 435 U.S. 291, 294 n.3 (1978); *Nyquist* v. *Mauclet*, 432 U.S. 1, 18-19 (1977) (Rehnquist, J., dissenting).

The characteristic which defines the class of illegal aliens, *i.e.*, the illegality of their presence in the United States, is neither immutable nor is it beyond the control of members of the class. It is a self-imposed characteristic which the aliens acquire by their very violation of federal laws.[41] As the Court stated in *Ambach* v. *Norwick*, 441 U.S. 68, 80 (1979), of lawfully resident aliens who refused to declare their intention to seek United States citizenship, illegal aliens have "chosen to classify themselves".[42]

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[41] While it is true that appellees' minor children cannot be held morally responsible for the violation of federal laws caused by their having been brought to this country, it is also true, as the Fifth Circuit pointed out in its opinion in *Plyler*, 628 F.2d at 457, that they are, like adult aliens, subject to deportation. 8 U.S.C. §1227 (1976).

[42] It should be noted that in both *Foley* and *Ambach* the Court indicated that strict scrutiny is not always the appropriate level of judicial review even when the classification is based upon the status of being a lawfully resident alien. In *Foley*, the Court stated that the state statute should be judged under the rational basis test since "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship'." 435 U.S. at 295, *quoting Nyquist* v. *Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting).

Perhaps even more fundamental to the court's consideration than the lack of some immutable characteristic defining the class of illegal aliens is the fact that they are a class of persons whose very presence in this country violates federal law. The increased judicial solicitude appropriate in the case of the suspect classes of race, ancestry and legal alienage is simply not appropriate when dealing with lawbreakers. *Boe* v. *Wright*, 648 F.2d 432, 441 n.18 (5th Cir. 1981) (Reavley, J., concurring).

The second basis articulated by the court for the application of strict scrutiny to statutory classifications affecting lawfully resident aliens, the plenary federal power over immigration, is plainly inapplicable to illegal aliens. The situation of illegal aliens is precisely opposite to that of lawfully resident aliens with respect to this ground, *i.e.*, the federal decision has been to exclude them, not to admit them. The principle enunciated in the prior cases thus applies, but with the opposite result: the state should be allowed to avoid undercutting the federal decision to exclude and exposing itself to legal challenge by eliminating state-created incentives to illegal immigration.

B. *The Educational Interest at Issue Is Not a Fundamental Interest Warranting Constitutional Protection.*

The Court's opinion in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 35 (1973), makes clear that education itself is not a fundamental interest which is explicitly protected by the United States Constitution. The Court did, however, state in *Rodriguez* that because of the relationship of education to other constituionally protected rights, particularly the right to free speech and the right to vote, there might be "some identifiable quantum of education" which might also be constitutionally protected. 411 U.S. at 36. The issue was left unresolved since the court found that the facts in *Rodriguez* revealed only a relative difference in spending levels for education in the school districts involved and did not amount to an absolute deprivation of education. 411 U.S. at 37. The district courts found in these cases that section 21.031 resulted in a total deprivation of education

from appellees' children. *Alien Children*, 501 F. Supp. at 557; *Plyler*, 458 F. Supp. at 580.

The view that section 21.031 results in an absolute deprivation of education from appellees' children is of dubious validity. First, there was evidence presented to the lower courts that some illegal alien children were attending the public schools on the payment of tuition, *Plyler*, 458 F. Supp. at 575, or were attending private schools in lieu of public schools, *Alien Children*, 501 F. Supp. at 561. More important, appellees are entitled to free public education in the Republic of Mexico, even if it may not be regarded as equivalent in quality to that provided in the United States. The Mexican Constitution makes elementary education obligatory and guarantees free public education through the university level to all Mexican citizens.[43] As will be shown,[44] it is reasonable to assume that appellees will ultimately be forced to comply with federal law and return to Mexico with their children. It is also reasonable to believe that Mexican parents, being no less devoted to their children's well-being than their counterparts in the United States, would insure that their children obtain an education by returning them to Mexico if they are in a practical sense barred from obtaining an education in the United States by a decision of this Court or otherwise.

Even assuming, *arguendo*, that the lower courts were correct in characterizing the effect of section 21.031 as a total deprivation of education to at least some of appellees' children, the inappropriateness of holding education to be a fundamental interest in the context of the present cases is that the *Rodriguez* rationale which might justify such a holding simply does not apply to illegal aliens. The fundamental difference between the situation envisaged by the *Rodriguez* court and the situation in the present cases is that there is no warrant to believe that illegal aliens will have occasion to take advantage of the other constitutional rights for the

[43] Constitution of Mexico, tit. I, ch. I, arts. 3(VI)-(VII) (translation published by General Secretariat of the Organization of American States (Washington, D.C. 1977)).

[44] *See* notes 45-46 *infra* and accompanying text.

effective exercise of which education is so important. The ready assumption on the part of all the lower courts that illegal aliens are, as one court put it, "here to stay", *Alien Children*, 501 F. Supp. at 558, mistakenly disregards the significance of their violation of law, to the application of the *Rodriguez* rationale and otherwise.

The implication seemingly sought to be drawn by the lower courts in their assumption the appellees' children will not be deported is that because Congress has not provided to enforcement agencies resources adequate to stop totally the flow of illegal aliens crossing our borders, it has somehow implicitly sanctioned or at least condoned their presence in this country. In fact, Congress has steadily increased the budget of the INS in recent years. As indicated previously, INS apprehensions of illegal aliens have increased dramatically in the last decade.[45] While it is widely acknowledged that manpower limitations have diminished the effectiveness of the INS, the difficulties in enforcement faced by the INS are in part attributable to the "enormous increase in illegal immigration over the past 20 years." *Blackie's House of Beef, Inc.* v. *Castillo*, Nos. 79-1057, *et al.*, *slip op.* at 18 (D.C. Cir. July 22, 1981). Writing for the court in *Blackie's*, Judge McGowan characterized the INS' exercise of its enforcement power as "vigorous" and "zealous" despite the agency's manpower limitations. *Id.* at 17, 18. Moreover, as discussed previously,[46] the issues surrounding immigration policy have received extensive consideration and study by both Congress and the Executive in recent years. Absent a strong showing to the contrary, FAIR would argue that courts should not indulge assumptions which would suggest that a coordinate branch of government will have any less commitment to law enforcement than the judiciary has.

Even if an illegal alien succeeds, by avoiding detection and deportation, in remaining in the United States for an extended period of time, he would certainly not be entitled to exercise the

[45] *See* text accompanying note 9 *supra*.

[46] *See* text accompanying notes 32-35 *supra*.

right to vote, one of the primary constitutional rights on which the *Rodriguez* decision focused. Illegal aliens working in the United States are generally barred from obtaining even permanent resident status,[47] much less the citizenship required to exercise the franchise. With respect to the relationship between First Amendment rights and education emphasized by the *Rodriguez* court, it is clear that even lawfully resident aliens do not enjoy the full protection of the First Amendment afforded to citizens.[48] Under the Court's ascending scale of rights analysis, illegal aliens would certainly not be entitled to a greater degree of protection than lawful resident aliens.

Lastly, the value of an education to an illegal alien, in practical economic terms, is substantially diminished, if not destroyed, by the Court's holding in *De Canas*. An affirmance of the lower court decisions in the present cases would mean that an illegal alien would be entitled to a free public education but could be denied an opportunity to use that education in a productive capacity. The incongruity of this situation should give the court pause in holding education to be a fundamental interest for equal protection purposes in the present cases.

C. *Section 21.031 Is Rationally Related to Legitimate State Purposes.*

Having demonstrated that the rational basis test is the appropriate standard of judicial scrutiny under which to judge the constitutionality of section 21.031, we argue here that section 21.031 does not violate the Equal Protection Clause in that it bears a rational relationship to the achievement of legitimate purposes. A statute is deemed to fail the rational basis only if it rests on grounds wholly irrelevant to the achievement of a legitimate

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[47] 8 U.S.C. §1255(c)(2) (1976 & Supp. III 1979).

[48] 8 U.S.C. §1251(a)(6) (1976 & Supp. III 1979) (permitting deportation of lawful aliens for advocacy of certain political beliefs and membership in organizations which advocate such beliefs). Congress' power to deport aliens on these grounds has been upheld against constitutional attack. *Galvan* v. *Press*, 347 U.S. 522 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Cf. Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469 (1963) (holding Government did not meet burden of proof but not questioning constitutionality of statute).

governmental objective. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). "A statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. Section 21.031 satisfies the standard established by the Court in *McGowan* and subsequent cases, and therefore, does not violate the Equal Protection Clause. *See Boe* v. *Wright*, 648 F.2d at 437 (Reavley, J., concurring).

1. *Section 21.031 Is Rationally Related to the Legitimate State Purpose of Protecting the Fiscal Integrity of and Quality of Educational Services Offered by the Texas Public School System.*

One state interest advanced by the State of Texas in support of section 21.031 is protection of the fiscal integrity of the public school system. A particular concern voiced by the State is the protection of those financially troubled school districts and schools in low income areas from the additional burdens of educating large numbers of illegal aliens who tend to be concentrated in such areas. Contrary to the conclusions reached by the lower courts in these cases, this Court has clearly held that the cost of a state or locally funded program is a legitimate state interest. *Dandridge* v. *Williams*, 397 U.S. 471, 479-80 (1970). *See also Boe* v. *Wright*, 648 F.2d at 437 (Reavley, J., concurring). This is the case even though cost may not be a sufficiently compelling interest to justify, in and of itself, a state classification where heightened levels of judicial scrutiny are deemed appropriate. *Graham* v. *Richardson*, 403 U.S. 365 (1971) (strict scrutiny); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (strict scrutiny); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (so-called "intermediate level" scrutiny).

There is no doubt that exclusion of illegal aliens from the provisions of free public education rationally serves this interest. Evidence presented to the lower courts in these cases amply demonstrates that the presence of increasing numbers of illegal alien school children in public schools in Texas has strained the limited resources of the independent school districts. *Alien*

Children, 501 F. Supp. at 580; *Plyer*, 458 F. Supp. at 590. Illegal alien children, principally because of language barriers, require more individual attention from teachers and are more costly to educate than the average child in the public school system. *Plyler*, 458 F. Supp. at 589. The provision of bilingual education services to these children is very costly[49] and may not be possible due to the severe lack of qualified teachers. *Alien Children*, 501 F. Supp. at 581; *Plyler*, 458 F. Supp. at 576. The evidence also indicates that illegal aliens generally reside in lower income areas served by schools which may be already financially strained. *Plyler*, 458 F. Supp. at 590; *Alien Children*, 501 F. Supp. at 580. The influx of new students puts an additional burden on these impoverished districts which they may not have the resources to meet.

There is another dimension to the state's classification which underscores its rationality. As discussed above,[50] the principal governmental interest behind the provision of free public education is the necessity of an educated citizenry to the preservation of our democratic form of government. The Court has recognized this connection between education and the ability to perform the duties of citizenship in our democratic society on numerous occasions. *Wisconsin* v. *Yoder*, 406 U.S. 206, 221 (1972); *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

Since it is erroneous to assume that illegal aliens will remain in this country and that even if some do, they will be barred from exercising the rights of franchise and employment and will enjoy at most only limited rights of expression,[51] the principal state interests served by the provision of free public education would not in the main be served by permitting illegal aliens to attend free public

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[49] Bilingual education could become increasingly costly as a result of a recent decision holding that Mexican-American children of limited English proficiency have a constitutional right to bilingual services. *United States* v. *State of Texas*, 506 F. Supp. 405 (E.D. Tex. 1981). The court's order specified, *inter alia*, that bilingual education must be provided in most subjects and that batteries of tests upon initial entry and yearly thereafter must be given to gauge English proficiency progress. *Id.* at 439-41.

[50] *See* discussion in section II(B).

[51] *See* note 48 *supra* and accompanying text.

schools. Texas could therefore "reasonably have concluded that it should not dilute its limited resources by providing free public education to illegal alien children." *Boe* v. *Wright*, 648 F.2d at 436 (Reavley, J., concurring).

2. *Section 21.031 Is Rationally Related to the Legitimate State Purpose of Avoiding Litigation Against the State by Removing a Possible Federal Constitutional Infirmity in a State Statute.*

Although not expressly advanced by the State of Texas as a reason to support the enactment of section 21.031, it is reasonable to suppose that the state legislature would be sufficiently concerned about the possibility of litigation challenging the validity of a state statute on the ground that the statute encouraged illegal immigration in the face of a contrary federal policy that it would take steps to eliminate such a possibility. At least three reasons for such a concern are apparent.

First, since the supposed target of the litigation would be a product of the legislature's own making, it could naturally seek to reduce the legal vulnerability of the statute at issue as part of its public duty to legislate responsibly. Second, since Texas is a border state with particularly vexing problems arising out of illegal immigration, the legislature possesses a special obligation to its constituents to insure that the laws of the state are crafted so as to not conflict with federal regulation of immigration designed to deal with those problems. To put it another way, the legislature could have reasonably seen it necessary "to avoid an incentive to illegal immigration that it would otherwise create by its own laws and with the public's money." *Boe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring). Third, since litigation challenging a state statute on federal constitutional grounds could result in protracted proceedings requiring a significant commitment of the state's resources including legal manpower from the executive, the legislature could out of a desire to secure efficiency in state government seek to remove a potential drain on the executive which such litigation would constitute.

As noted before,[52] one of the doctrinal bases of the Court's decisions involving equal protection challenges to state statutes adversely affecting lawfully resident aliens is the plenary federal power over immigration and naturalization. *E.g.*, *Flores de Otero*, 426 U.S. at 602. The situation presented in the instant cases is the mirror image of that in those earlier cases. In the present cases, the clearly expressed decision of Congress is that neither appellees nor their children should have entered or be permitted to remain in this country. Just as a state may not create disincentives which undercut Congress' decision to admit aliens to this country, by the same token a state should not be permitted to provide or perpetuate incentives which would frustrate the federal decision to exclude. At the very least, a state should be allowed to remove an incentive which it sees as contrary to such an overriding federal policy, and thereby remove an invitation to litigation.

The provision of free public education by the states is plainly an incentive to illegal immigration, even if it is not the primary incentive. At the very least, it is an incentive for illegal alien parents such as appellees to bring their children here, if not an incentive for the parents themselves to come. *Boe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring) ("Can it be denied that free education is an incentive to move across the Rio Grande?"). *Cf. Graham*, 403 U.S. at 376-80 (withholding welfare benefits discourages entry into states); *Shapiro* v. *Thompson*, 394 U.S. 618, 632 (1969) (recognizing parents will move to take advantage of better educational facilities for children). Free public education is an incentive for aliens not only to enter this country, but also to remain here illegally, for a more subtle impact of the provision of free education and other benefits to illegal aliens may be to turn seasonal visitors into full-time residents by causing them to drop out of the seasonal cycle of migration[53] to take advantage of permanent residence.

There is a substantial basis to believe that the creation or tolerance of such an incentive is exposed to a charge of being un-

[52] *See* discussion in section II (A) *supra*.

[53] *See generally* M. Pyle, Birds of Passage (1979), chs. 3 and 7 (discussing process of migration).

constitutional under the Supremacy Clause. The Court has indicated that state action must be invalidated where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977); *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U.S. 714, 722 (1963); *Hill* v. *Florida*, 325 U.S. 538, 542 (1945). The Court in *De Canas*, concluded that the California statute barring employment of illegal aliens was "consistent" and "harmonious" with federal immigration laws. 424 U.S. at 357, 358. By the same reasoning, a state policy of providing free public education to illegal aliens is inconsistent and unharmonious with federal immigration policy because it would likely impede the accomplishment of Congress' stated goals, and would be "contrary to and in conflict with national immigration policy as established by Congress". *Boe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring).

Reference to *De Canas* serves another purpose. *De Canas* exemplifies the proposition that a lawsuit by persons aggrieved over public or private behavior concerning illegal aliens is reasonably foreseeable. A legislature could well envision actions, similar to those commenced by public entities,[54] brought by citizens or lawfully resident aliens, alleging harm to their children's school system and challenging a state statute which granted free public education to illegal aliens on the ground that it was preempted by the federal decision to exclude such persons from this country.

Beyond the state's legitimate concern that it may be exposed to costly litigation on the basis of a conflict between one of its statutes and an overriding federal policy, a state should be permitted to repeal parts of a state statutory scheme if and when it becomes evident that statutory policy would tend to frustrate the achievement of the federal policy. Considerations of appropriate relations between the states and the federal government would seem to dictate deference to a clearly expressed federal policy in an area such as immigration where federal power is so clearly preeminent.

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[54] *See* notes 27-28 *supra*.

Thus, by reference to the interest of eliminating the risk of litigation as well as to considerations of appropriate federal-state relations, section 21.031 does not contravene the requirements of the Equal Protection Clause as measured under the rational basis standard and when the state's interest in the fiscal integrity of its public school system is added, the statute should pass constitutional muster under even more exacting standards.[55]

Conclusion

America is a nation of immigrants. The pluralism of our society is one of its greatest triumphs. The individual contributions of the outstanding among these immigrants are too numerous to mention. FAIR regards the richness of diversity in our population a characteristic which we must always encourage by welcoming peoples of all lands through an equitable and rational immigration policy. Nothing else would be consistent with the generous, humanitarian character of the American people. The beacon of freedom which the United States casts throughout the world gives our nation a particular responsibility to open its doors to refugees fleeing oppression.

But just as our forebears, who at first recognized no quantitative restrictions on immigration, came to believe in the necessity of imposing controls on the numbers of foreign nationals who could lawfully cross our borders, so now is the time for a conscious recognition in our national policy that we have entered an age of limitation. No longer is our frontier unbounded, nor our resources apparently limitless. Yet simultaneously with our realization over

[55] The lower courts' reliance on the argument that Texas failed to adopt the most effective measure to deal with the problems created by the presence of illegal aliens, *i.e.*, prohibit employers from hiring illegal aliens, is misplaced. The inducement to illegal immigration created by employment opportunities comes principally from the private sector of the economy, whereas the incentive created by free public education comes from state and local governments. *Doe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring). Texas could have reasonably concluded that as a constitutional matter it was more important to eliminate the incentive which it had created by its affirmative policy than the incentive created by the private sector. *Id.*

the last decade that jobs, oil and government services are not as abundant or available as we once thought them to be, we have experienced an unprecedented surge of illegal entrance into this country by people who once respected our laws enough to wait until they qualified for lawful admission. We are now at an historic crossroad which requires that our attitudes release their grasp on outdated verities and accommodate to the new realities.

The dilemma presented by the cases now before this Court is symptomatic of the quandary in which current circumstances place the entire country. No one wishes to deny these claimants an education for their children. But lines must be drawn to secure respect for the law, because otherwise, the opportunity for the country to respond effectively to troublesome and complicated trends which have only recently emerged can be critically handicapped at precisely the moment when national leadership needs the flexibility to fashion policies appropriate to the times.

Respectfully submitted,

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